TANG MENG HOCK A

v.

TANG MING SENG

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
HELILIAH MOHD YUSOF JCA
ABDUL MALIK ISHAK JCA
[CIVIL APPEAL NO: K-02-894-06]
10 SEPTEMBER 2009 C

CONTRACT: *Consideration - Natural love and affection - Whether can constitute good consideration - Principles applicable - Contracts Act 1950, s. 26*

CONTRACT: *Interpretation - Intention of parties - Meaning to be given to words - Natural and ordinary meaning - Whether words ambiguous - Whether words capable of more than one meaning* D

The appellant and respondent are brothers who, upon their father's death, entered into an agreement prepared and witnessed E by a lawyer and called "family arrangements". According to the agreement, the appellant, as the elder brother of the respondent, agreed "for love and affection" to give to the respondent: (a) RM60,000 in cash; (b) an apartment unit to be paid for by the appellant but purchased in the respondent's name; and (c) a F specified piece of land registered in the appellant's name but which was to be transferred to the respondent. In return the respondent agreed to make no further claims against the estate of their late father.

G

The appellant carried out the first two items but reneged on the third and purported to unilaterally revoke the agreement on the grounds that it was: (a) too general and ambiguous; and (b) lacked consideration.

H

The respondent's action to enforce the third item was allowed by the trial judge who found the family arrangements were valid. The appellant has appealed.

I

Held (dismissing the appeal with costs)
Per Low Hop Bing JCA (delivering the judgment of the court):

(1) Upon a careful and plain reading of the family arrangements, the intention of the parties is expressly set out and is without doubt specific, clear and unambiguous. (para 17)

(2) The issue of consideration can be determined by reference to s. 26(a) of the Contracts Act 1950 which states that an agreement made without consideration is void unless it is expressed in writing and registered, and is made on account of natural love and affection between parties standing in a near relation to each other. (para 18)

(3) It is an established principle that natural love and affection is a good and valid consideration in law. The question of whether there is in fact any natural love and affection may be determined by reference to the evidence and surrounding circumstances. (paras 19 & 20)

(4) The parties are biological brothers and in near relation to each other, being related by actual birth. Furthermore as the family arrangements had been reduced to writing and the agreement was duly stamped under the Stamp Act, ss. 47A(1) and 48, the court had no hesitation in finding that the requirements of s. 26(a) of the Contracts Act 1950 were fulfilled. (para 22)

(5) The family arrangements are therefore valid and enforceable. (para 22)

Per Abdul Malik Ishak JCA (delivering separate concurring judgment):

(1) The basic principles of interpreting a document are that: (a) one must consider what it would convey to a reasonable person who has all the background knowledge; (b) the meaning which may be conveyed to a reasonable person is not the same as the meaning to be gathered from the words of the document itself, which may be deduced by reference to dictionaries and grammars, and must be viewed against the background which the parties would reasonably have understood it to mean; and (c) the words in the document should be given their natural and ordinary meaning. (paras 35 & 56)

(2) It is important to read the family arrangements as a whole and not on a piecemeal basis, and one must assume that the words used were intended to bear their ordinary meaning. It could not be concluded that a mistake was made by the lawyer in drafting the family arrangements as otherwise the appellant would not have complied with the first two items. (para 37)

(3) The words used were clear and unambiguous and did not have double or multiple meanings. (para 38)

(4) The traditional definition of consideration tends to revolve on benefit and detriment. To prevent an unjust avoidance of an agreement, the courts may give artificial interpretations to the principles of consideration. Consideration and motive are quite different and the latter is not enforceable. (paras 39, 44 & 49)

(5) Forbearance can constitute good consideration, and a simple promise not to do something which the promisee was entitled to do, or failure to exercise an existing right at the request of the promisor, will constitute good and sufficient consideration. (para 51)

(6) The question of moral obligation is housed in s. 26(a) of the Contracts Act 1950, where the phrase "natural love and affection" must be linked to the requirement that the parties must be "standing in a near relation to each other". Here the parties are biological brothers and are clearly standing in a near relation to each other. As the family arrangements fulfilled all the requirements of s. 26(a) of the Contracts Act 1950, they have all the trappings of legality and must be held to be valid and enforceable. (paras 52 & 55)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu dan responden adalah adik-beradik yang, selepas kematian ayah mereka, telah memasuki suatu perjanjian yang disediakan dan disaksikan oleh seorang peguam di namakan "rancangan keluarga". Mengikut perjanjian tersebut, perayu, sebagai abang kepada responden, menyetujui "kerana kasih sayang semula jadi" untuk memberi kepada responden: (a) wang tunai RM60,000; (b) seunit apartmen yang dibayar oleh perayu tetapi dibeli di bawah nama

responden; dan (c) sebidang tanah spesifik yang didaftar di bawah nama perayu tetapi akan ditukar milik kepada responden. Sebagai balasan, responden bersetuju supaya tidak akan membuat sebarang tuntutan lagi terhadap estet mendiang ayah mereka.

Perayu melaksanakan dua item pertama tetapi tidak melaksanakan item ketiga dan kononnya membatalkan perjanjian itu secara unilateral atas alasan bahawa perjanjian itu: (a) terlalu am dan taksa; dan (b) tiada balasan.

Tindakan responden untuk menguatkuasakan item ketiga dibenarkan oleh hakim bicara yang memutuskan bahawa rancangan keluarga tersebut adalah sah. Perayu membuat rayuan.

Diputuskan (menolak rayuan perayu dengan kos)
Oleh Low Hop Bing HMR (menyampaikan penghakiman mahkamah):

(1) Dengan bacaan biasa dan teliti rancangan keluarga tersebut, niat pihak-pihak berkenaan ternyata sekali dan tidak diragukan ianya khusus, jelas dan tidak taksa.

(2) Isu balasan boleh diputuskan dengan merujuk kepada s. 26(a) Akta Kontrak 1950 yang menyatakan bahawa suatu perjanjian yang dibuat tanpa balasan tidak sah kecuali jika ianya dinyatakan secara bertulis dan didaftarkan, dan dibuat kerana kasih sayang semulajadi di antara pihak-pihak yang mempunyai talian persaudaraan rapat.

(3) Adalah suatu prinsip yang kukuh bahawa kasih sayang semulajadi merupakan balasan yang sah di sisi undang-undang. Soalan sama ada pada hakikatnya terdapat sebarang kasih dan sayang boleh ditentukan dengan merujuk kepada keterangan dan keadaan sekeliling.

(4) Pihak-pihak di sini adalah adik-beradik biologikal dan bersaudara rapat kerana pertalian peranakan mereka. Lagipun, kerana rancangan keluarga tersebut telah dinyatakan secara bertulis dan perjanjian itu disetemkan di bawah Akta Setem 1949, ss. 47A(1) dan 48, mahkamah tidak teragak-agak memutuskan bahawa syarat-syarat s. 26(a) Akta Kontrak 1950 telah dipenuhi.

(5) Rancangan keluarga tersebut adalah sah dan boleh dikuatkuasakan. A

Oleh Abdul Malik Ishak HMR menyampaikan penghakiman menyetujui berasingan:

(1) Prinsip-prinsip asas apabila mentafsirkan sesuatu dokumen adalah: (a) makna yang disampaikan kepada seorang munasabah yang mempunyai semua pengetahuan latarbelakang mesti dipertimbangkan; (b) makna yang disampaikan kepada seorang munasabah tidak sama dengan makna yang didapati daripada perkataan-perkataan dokumen itu sendiri, yang boleh didapati melalui rujukan kepada kamus dan tatabahasa, dan latarbelakang kepada dokumen itu mesti diambilkira untuk memahami bagaimana pihak-pihak kepada dokumen itu sepatutnya memahami maknanya; dan (c) perkataan-perkataan di dalam suatu dokumen seharusnya diberikan makna yang semulajadi dan biasa. B C D

(2) Adalah penting supaya persiapan keluarga tersebut dibaca pada keseluruhannya dan bukan sebahagian demi sebahagian, dan mestilah dianggap bahawa tujuannya ialah supaya perkataan yang digunakan diberikan makna biasa mereka. Tidak boleh diputuskan bahawa kesilapan telah dilakukan oleh peguam apabila merangkakan rancangan keluarga tersebut kerana jika begitu, perayu tidak akan menunaikan dua item tersebut itu. E F

(3) Perkataan-perkataan yang digunakan adalah jelas dan tidak taksa dan tidak mempunyai dua atau lebih makna.

(4) Definisi tradisional balasan sering melibatkan sesuatu manfaat atau kerugian. Untuk menghalang pembatalan sesuatu perjanjian yang tidak adil, mahkamah boleh memberi interpretasi palsu kepada prinsip balasan. Balasan dan motif adalah berbeza dan motif tidak dapat dikuatkuasakan. G

(5) Forebearans merupakan balasan yang baik, dan janji untuk tidak melakukan sesuatu yang penerima janji berhak melakukan, atau kegagalan menguatkuasakan suatu hak atas permintaan pemberi janji, akan merupakan balasan yang sah dan mencukupi. H I

(6) Soal kewajipan moral terkandung di dalam s. 26(a) Akta Kontrak 1950, di mana ungkapan "kasih sayang semulajadi" mesti dikaitkan kepada syarat bahawa pihak-pihak mesti "berada di dalam hubungan persaudaraan rapat". Di sini, pihak-pihak adalah adik-beradik biologikal dan dengan jelasnya mempunyai hubungan persaudaraan rapat. Oleh kerana rancangan keluarga tersebut mematuhi kesemua syarat s. 26(a) Akta Kontrak 1950, ianya mempunyai semua keperluan keesahan dan mesti diputuskan sebagai sah dan boleh dikuatkuasakan.

Case(s) referred to:

Antara Elektrik Sdn Bhd v. Bell & Order Bhd [2002] 3 MLJ 321 HC ***(foll)***

Bank of Credit and Commerce International SA v. Ali and Others [2002] 1 AC 251 ***(foll)***

Central Bank of India v. Hartford Fire Insurance Co Ltd AIR [1965] SC 1288 ***(foll)***

Chock Yook Kwai v. Chock Yook Chong & Ors [2002] 8 CLJ 161 HC ***(foll)***

Currie And Others v. Misa [1874-5] LR 10 Ex 153 ***(foll)***

Dunlop Pneumatic Tyre Company Limited v. Selfridge And Company Limited [1915] AC 847 ***(refd)***

Dunton v. Dunton [1892] 18 VLR 114 ***(refd)***

HSBC Bank plc v. Liberty Mutual Insurance Co (UK) Ltd [2001] All ER 61 ***(foll)***

Investors Compensation Scheme v. West Bromwich Building Society Ltd [1998] 1 WLR 896 ***(foll)***

JM Wotherspoon & Co Ltd v. Henry Agency House [1962] MLJ 86 ***(foll)***

Kwan Teck Meng & Ors v. Liew Sam Lee [1963] MLJ 333 ***(foll)***

Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor [1976] 2 MLJ 177 ***(foll)***

Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997] AC 749 ***(refd)***

Melanesian Mission Trust Board v. Australian Mutual Provident Society [1997] 1 NZLR 391 ***(foll)***

Mulpha Pacific Sdn Bhd v. Paramount Corp [2003] 4 CLJ 294 CA ***(refd)***

National Coal Board v. Win Neill & Sonist Helen [1984] 1 All ER 555 ***(foll)***

Pillans v. Van Mierop [1765] 3 Burr 1663 ***(refd)***

Prenn v. Simmonds [1971] 1 WLR 1381 ***(refd)***

Queck Poh Guan (As Administrator of the Estate of Sit Kim Boo, deceased) v. Quick Awang [1998] 6 MLJ 388 ***(foll)***

Rann v. Hughes [1778] 4 Bro PC 27 ***(refd)***

Reardon Smith Line Ltd v. Yngvar Hansen-Tangen (Trading As HE Hansen-Tangen), Yngvar Hansen-Tangen (Trading As HE Hansen-Tangen) v. Sanko Steamship Co [1976] 1 WLR 989 ***(refd)***

Royal Selangor Golf Club v. Anglo-Oriental (Malaya) Sdn Bhd [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 HC ***(foll)***
Shadwell v. Shadwell [1860] 9 CB (NS) 159 ***(refd)***
Thomas v. Thomas [1842] 2 QB 851 ***(refd)***
Ward v. Byham [1956] 1 WLR 496 ***(refd)***
White v. Bluett [1853] 23 LJ R Ex 36 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 26(a)
Stamp Act 1949, ss. 47A(1), 48

Other source(s) referred to:
Sir Frederick Pollock, *Contracts*, 8th edn, p 175

For the appellant - AB Ng; M/s AB Ng & Assoc
For the respondent - Lim Boo Chang; M/s Lim Boo Chang & Co

[Appeal from High Court, Alor Setar; Civil Suit No: 22-171-2000]

Reported by Anne Khoo

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] On 30 November 2004, after a full trial, the Alor Setar High Court declared the family arrangements made between the respondent ("the plaintiff") and the appellant ("the defendant") on 8 June 1998 as valid and enforceable, and directed the defendant to transfer the land held under Lot 278 HS(D) 294/93, in the mukim of Padang Meha, district of Kulim ("the Meha land") to the plaintiff, and costs.

[2] This is the defendant's appeal against that decision.

Facts Of The Case

[3] The defendant is the plaintiff's elder brother. Their late father, Tang Kai Hoo, died on 29 June 1997, leaving a will dated 17 June 1997 ("the will") under which the defendant was appointed as executor. Save and except the land held under Geran No. 5069, Lot 560, in the mukim of Naga Lilit, Padang Serai, district of Kulim ("the Serai land"), their late father's properties had already been given to the children *inter vivos*.

[4] Under the will, the defendant was to get 15% of the proceeds of sale of the Serai land, while the plaintiff would get RM10,000 therefrom; and the balance would be distributed at the discretion of the defendant.

[5] After the death of their father, the defendant and the plaintiff entered into a written contract, by way of family arrangements dated 8 June 1998. The family arrangements, which form the legal basis of the plaintiff's claim and the defendant's counterclaim, merit reproduction *in extenso* as follows:

Family Arrangements

An Agreement made this 8th day of June 1998 between TANG MENG HOCK [NRIC NO. 581210-07-5405 (NEW) 5561720 (OLD)] of No. 1707, Mukim 12, Kampung Selamat, 13300 Tasek Glugor (hereinafter referred as the "DONOR") of the one part. And TAN MING SENG [NRIC NO. 7440404] of No. 1707, Tingkat Selamat 10, Tasek Glugor, Seberang Perai Utara, 13300 Penang (hereinafter referred as the "DONEE") of the other part.

For the love and affection the Donor shall give to the Donee the following:

(1) Cash RM60,000.00 on or before execution of Agreement herein (the sum of which the Donee hereby acknowledged receipt)

(2) One Unit Apartment – Taman Desa Relau 2, Parcel No. 10, Storey No. 12B, Building No. Q. (*vide* Sale Purchase Agreement dated 6th November 1995) purchased in the name of the Donee. The purchase price to be fully paid by the Donor.

(3) All that piece of land known as Lot No. 278, H.S. (D) 294/93 Mukim Padang Meha, Daerah Kulim presently registered in the name of the Donor shall be transferred into the Donee's name.

In Consideration thereof the Donee hereby acknowledged and confirm that the Donee shall make no further claims whatsoever against the Donor and/or the estates of TANG KAI HOO, deceased.

This Agreement shall be binding upon the respective heirs personal representatives successors in title and assigns of the Donor and the Donee.

Signed by the Donor	)	sgnd.
Tang Meng Hock	)	...
	)	Tang Meng Hock
and	)	
	)	
	)	
Donee	)	sgnd.
Tang Ming Seng	)	...
in the presence of	)	Tang Ming Seng

sgnd.
Tan Bak Lee
Advocate & Solicitor

Perakuan di bawah Sek. 48
Akta Setem 1949
Disetem di bawah Seksyen
47A(1) Akta Setem sebanyak
RM25/- dijelaskan sepenuhnya,

t.t.

Timbalan Pemungut Duti Setem
Daerah Timur Laut, Pulau Pinang
LHDN/P 01/2/42/08-148 24/7/99.

[6] The family arrangements were apparently prepared and witnessed by an advocate and solicitor and were expressed to be based on love and affection, pursuant to which the defendant has agreed to give the plaintiff:

(1) cash payment of RM60,000 on or before the execution thereof;

(2) an apartment unit; and

(3) the Meha land.

[7] In consideration thereof, the plaintiff agreed not to make any further claim against the defendant or the estate of their deceased father.

[8] The defendant had fulfilled items (1) and (2) under the family arrangements, by making the cash payment of RM60,000 and giving the apartment unit to the plaintiff, but not the Meha land in item (3).

[9] Some 19 months after the execution of the family arrangements, the plaintiff issued a notice dated 17 November 1999, enclosing Form 14A and related documents, demanding that the defendant transfer the Meha land to the plaintiff. However, the defendant refused to do so.

[10] *Vide* notice dated 18 December 1999 to the plaintiff's solicitors, the defendant challenged the validity of the family arrangements, on grounds of, *inter alia*, ambiguity and want of consideration.

[11] On 22 December 1999, the plaintiff's solicitors replied and reiterated the validity of the family arrangements.

[12] On 28 July 2000, the defendant through his solicitors' notice unilaterally revoked the family arrangements.

[13] The plaintiff then filed a writ of summons against the defendant for breach of the family arrangements. The defendant's counterclaim sought, *inter alia*, a declaratory order that the family arrangements were void.

[14] The learned trial judge upheld the validity of the family arrangements and gave judgment for the plaintiff on 3 November 2004, and dismissed the defendant's counterclaim. Hence, this appeal by the defendant.

Family Arrangements

[15] Mr A B Ng, defendant's learned counsel, contended, *inter alia*, that the family arrangements were void being:

(1) too general and ambiguous;

(2) based on love and affection and so without consideration; and

(3) revoked by the defendant on 28 July 2000

[16] Plaintiff's learned counsel Mr Lim Boo Chang took the view that the family arrangements were valid and enforceable, citing s. 26(a) of the Contracts Act 1950; *Mulpha Pacific Sdn Bhd v. Paramount Corp* [2003] 4 CLJ 294 CA; and *Antara Elektrik Sdn Bhd v. Bell & Order Bhd* [2002] 3 MLJ 321 HC.

[17] Upon a careful and plain reading of the family arrangements, we find that the intention of the parties had been expressly set out therein. Without a doubt, they are specific, clear and unambiguous. One may reasonably ask, how could the family arrangements be too general and ambiguous when the defendant has specifically performed two of the three items stated therein *viz* items (1) and (2) above? These were the promises the parties have expressly agreed and undertaken to perform. We have no difficulty in dismissing the defendant's submission which sought to invalidate the family arrangements on the ground that they were too general and ambiguous.

[18] In relation to the next argument presented for the defendant that the family arrangements based on love and affection were void, being without consideration, we are of the view that the elementary short answer is to be found in s. 26(a) of the Contracts Act 1950 which reads as follows:

> **26. Agreement made without consideration, void, unless:**
>
> An agreement made without consideration is void, unless –
>
> (a) it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other;

[19] The question whether there is in fact any natural love and affection may be determined by reference to the evidence adduced and the surrounding circumstances: *Kwan Teck Meng & Ors v. Liew Sam Lee* [1963] MLJ 333; *Queck Poh Guan (As Administrator of the Estate of Sit Kim Boo, deceased) v. Quick Awang* [1998] 6 MLJ 388; and *Chock Yook Kwai v. Chock Yook Chong & Ors* [2002] 8 CLJ 161 HC.

[20] It is an established principle that natural love and affection is good and valid consideration in law. This is all too well-known in land conveyancing law and practice.

[21] I have had the opportunity of considering the meaning of this expression in *Chock Yook Kwai, supra*, at p. 179. The relevant portions are:

A The expression "natural love and affection" has not been defined in s. 26(a), *supra*, and so the ordinary popular dictionary meaning applies.

In ordinary parlance, "natural" in the context of "natural love and affection" in my view means inborn; spontaneous; happening in
B the usual course; related by actual birth (not adoption).

The word "love" is denoted by fondness; and affection of the mind caused by that which delights; strong liking.

The word "affection" denotes an act of influencing; emotion;
C disposition; love or attachment (See *Chambers Twentieth Century Dictionary*).

There is in my view a special position, meaning and dimension attributed to the expression "natural love and affection", both in fact and in law.
D

In my considered opinion, in the case of the natural parents and their children, a presumption of natural love and affection arises so that a valid consideration is constituted in law for the purposes of s. 26(a), *supra*.

E For s. 26(a) to apply, two requirements must be fulfilled, *viz* the agreement is in writing and registered; and there must be natural love and affection between parties standing in near relation to each other.

F **[22]** The facts in the mainstream of the instant appeal reveal that the family arrangements had been reduced to writing and it has been duly stamped and registered as "LHDN/P 01/2/42/08-148 24/7/99", with the endorsement by the Stamp Office under ss. 47A(1) and 48 of the Stamp Act 1949. A stamp duty of
G RM25 has been levied thereon. It has been expressed to be for love and affection. The parties are biological brothers. They are certainly in near relation to each other, being related by actual birth. There is no substance in the defendant's submission. Hence, we have no hesitation in finding that the requirements of
H s. 26(a) have been fulfilled, and hold that the family arrangements are valid and enforceable.

[23] That being the case, it is the duty of the court to give effect to the bargain of the parties according to their intention in writing
I by looking at the words used, unless they are such that one may suspect that they do not convey the intention correctly. As the words used therein are clear and unambiguous, there is very little

that the court has to do. The court will invariably give effect to the plain meaning thereof: *Mulpha Pacific Sdn Bhd, Royal Selangor Golf Club v. Anglo-Oriental (Malaya) Sdn Bhd* [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 HC; *National Coal Board v. Win Neill & Sonist Helen* [1984] 1 All ER 555; and *Central Bank of India v. Hartford Fire Insurance Co Ltd* AIR [1965] SC 1288.

[24] Since the contract has set out the family arrangements in clear and unambiguous words, the parties are bound by what they had agreed to, and neither party could unilaterally revoke or go against it: see eg, *Antara Elektrik Sdn Bhd, supra*, at p. 324A per Azmel J (later FCJ).

Conclusion

[25] For reasons given above, we hold that the learned trial judge's decision is free from any error; and we affirm it. The defendant's appeal is hereby dismissed with costs of RM3,000 to the plaintiff. Deposit to the plaintiff on account of the costs.

[26] My learned brother Haji Abdul Malik bin Haji Ishak JCA has also written a separate judgment in support of this judgment.

Abdul Malik Ishak JCA:

[27] This appeal concerns a squabble between two biological brothers arising from the family arrangements dated 8 June 1998 entered between them. That family arrangements formed the plank of the plaintiff respondent's claim and the defendant appellant's counterclaim.

[28] By way of that family arrangements, the defendant appellant as the donor has agreed to give to the plaintiff respondent as the donee for love and affection:

(a) cash in the sum of RM60,000;

(b) one unit apartment located at Taman Desa Relau 2; and

(c) a piece of land at Mukim Padang Meha.

[29] And by way of a consideration, the plaintiff respondent agreed not to make any further claim against the defendant appellant or against the estate of their deceased father.

[30] The defendant appellant had complied with categories (a) and (b) of the family arrangements but refused to fulfil category (c) thereto.

[31] Through their solicitors, the brothers were at loggerheads as to the validity of the family arrangements. The defendant appellant argued that the family arrangements were ambiguous and lacked consideration. While the plaintiff respondent said otherwise and argued that the family arrangements were valid.

[32] The altercation got worse when on 28 July 2000, the defendant appellant gave notice through his solicitors and unilaterally revoked the family arrangements. This prompted the plaintiff respondent to file a writ of summons against the defendant appellant for breach of the family arrangements. The defendant appellant responded and through his counterclaim sought, *inter alia*, for a declaration that the family arrangements between them were void.

[33] The High Court heard the case and, consequently, gave judgment in favour of the plaintiff respondent by upholding the validity of the family arrangements. The High Court also dismissed the defendant appellant's counterclaim. Aggrieved by the decision of the High Court, the defendant appellant now appeals to this court.

[34] I am fortunate that my learned brother Low Hop Bing, JCA has meticulously set out the facts of the case in his judgment and I gratefully adopt them. Suffice for me to say that the dispute between the two brothers centred on the family arrangements.

[35] I must emphasise that the family arrangements were prepared and witnessed by an advocate and solicitor and it had been reduced in written form, duly stamped and registered and carried the endorsement by the Stamp Office under ss. 47A(1) and 48 of the Stamp Act 1949 (Act 378). With these basic background in mind, I must now proceed to interpret the family arrangements between the two biological brothers. But first, I must state the basic principles of interpretation:

(i) that in interpreting a document one must consider what the document would convey to a reasonable person who has all the background knowledge surrounding the document and the background knowledge would include absolutely anything;

(ii) that the meaning which a document may convey to a reasonable person is not the same and is different from the meaning to be gathered from the words of the document itself; it is said that the meaning of the words may be deduced by referring to dictionaries and grammars; it is also said that the meaning of the document must be viewed against the relevant background which the parties using the document would have reasonably understood it to mean (*Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] AC 749); and

(iii) that the words in the document should be given their "natural and ordinary meaning" and such an approach is described as a common sense approach bearing in mind that people do not make linguistic mistakes when preparing formal documents just like the family arrangements at hand.

[36] It would certainly be ideal to read the judgments of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 WLR 1381, at pp. 1384 to 1386 and in *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen (Trading As H.E. Hansen-Tangen), Yngvar Hansen-Tangen (Trading As H.E. Hansen-Tangen) v. Sanko Steamship Co.* [1976] 1 WLR 989. In the former case, the rationale of excluding negotiations was that no consensus had then been reached between the parties whereas in the latter case it was said that the court should place itself in the same factual context as that in which the parties were when they made their agreement. It was because of the speeches of Lord Wilberforce in these two cases that prompted Lord Hoffmann to set out the principles of interpretation in the case of *Investors Compensation Scheme v. West Bromwich Building Society Ltd.* [1998] 1 WLR 896 as demonstrated in this judgment.

[37] It is important to read the family arrangements as reproduced verbatim by his Lordship Low Hop Bing, JCA in his judgment as a whole and not on a piecemeal basis. It is a good starting point to assume and I must assume that the words used in the family arrangements drawn up and witnessed by an advocate and solicitor were intended to bear their ordinary meaning. And I too cannot jump to the conclusion that a mistake has been made by the advocate and solicitor in drafting the family arrangements. There was nothing amiss. For if there were, the defendant appellant would not have complied with categories (a) and (b) of the family arrangements. I am not prepared to re-write

the family arrangements (see *HSBC Bank plc v. Liberty Mutual Insurance Co (UK) Ltd* [2001] All ER 61 which was affirmed on appeal *vide* [2002] EWCA Civ 691).

[38] I have perused through the family arrangements with a fine toothcomb and I must say that the words used are clear and unambiguous (*Melanesian Mission Trust Board v. Australian Mutual Provident Society* [1997] 1 NZLR 391). There is no ambiguity to be detected because there is none. And of importance is this, that there is no double or multiple meaning to the family arrangements at all. It is as simple as that. And so, I hold that it is wrong to say as was said by the learned counsel for the defendant appellant that the family arrangements were void as being too general and ambiguous. They are not. On the contrary, they are valid and binding. And they are not ambiguous.

[39] An argument was also advanced to the effect that the family arrangements were void since it was based on love and affection and therefore there was no consideration. The traditional definition of consideration tends to revolve on the ideas of benefit and detriment. Thus, Lush J, in *Currie And Others v. Misa* [1874-5] LR 10 Ex 153 at p. 162 defined consideration in this way:

> A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.

[40] Sir Frederick Pollock in his book on *Contracts*, 8th edn, at p. 175 defined consideration as:

> An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

[41] And Sir Frederick Pollock's definition received the approval of Lord Dunedin in *Dunlop Pneumatic Tyre Company Limited v. Selfridge And Company Limited* [1915] AC 847, at p. 855. This sort of definition makes reference to the price requested by the promisor in exchange for which the promisor's promise was bought.

[42] All the case laws are concerned with identifying what can constitute consideration and whether it is possible to enforce a promise in the absence of consideration.

[43] Speaking historically, when Lord Mansfield became the Chief Justice of the King's Bench in 1756 he refused to recognise consideration as a vital criterion to a contract and he treated consideration as mere evidence of the parties' intention to be bound and he relied heavily on the presence of writing in order to show intention (see *Pillans v. Van Mierop* [1765] 3 Burr 1663). Lord Mansfield held that a moral obligation could amount to consideration. To say the least, this view effectively destroyed the doctrine of consideration. According to Lord Mansfield, making a promise implies a moral obligation to keep it and so every promise would be supported by consideration. And we all know that Lord Mansfield's approach was repelled subsequently (see *Rann v. Hughes* [1778] 4 Bro. PC 27).

[44] In order to prevent an unjust avoidance of an agreement, the courts would proceed to give an artificial interpretation to the principles of consideration. This was done in the case of *Ward v. Byham* [1956] 1 WLR 496 as well as in the case of *Shadwell v. Shadwell* [1860] 9 CB (NS) 159 where there were sound reasons of policy and justice for enforcing the doctrines and where the doctrine of consideration had to be considerably stretched in order to give effect to the agreements.

[45] The case of *Ward v. Byham (supra)* illustrates the willingness of the courts to find evidence of some consideration where public policy reasons seem to demand that a promise be binding. The facts of that case may be stated as follows. Ms Ward and Mr. Byham lived together from 1949 to 1954, and in 1950 they had a daughter. In 1954, Mr. Byham threw Ms Ward out of the house, but kept their daughter with him. Some months later, Ms Ward asked to take the child to live with her, and Mr. Byham wrote to say that she could do so, and that he would pay £1 a week maintenance provided that she could "prove that the daughter will be well looked after and happy", and that the little girl was allowed to decide for herself whether or not she wanted to go and live with her mother. Ms Ward duly took their daughter. Mr. Byham paid the maintenance as agreed for seven months but stopped when Ms Ward married another man. She sued for the money. Mr. Byham alleged that there was no consideration because as the mother of an illegitimate child, she was already under a statutory duty to maintain the little girl and so her promise to do so was not consideration. On the facts, the majority of the court held that

there was a valid contract because her promise to see that their daughter was happy and to allow their daughter to choose which parent their daughter wanted to live with, went beyond her statutory duty, and could therefore be consideration for Mr. Byham's promise to pay maintenance.

[46] I will now narrate briefly the facts of *Shadwell v. Shadwell (supra)*. The plaintiff in that case was a young barrister and was engaged to be married. His uncle wrote and offered to give him £150 a year, until such time as the plaintiff was earning 600 guineas a year from his practice at the Bar. The plaintiff duly got married. The plaintiff never reached the point where he was earning 600 guineas a year but the allowance promised by his uncle was not always paid. When the uncle died, the plaintiff brought an action to recover the arrears from his uncle's personal representatives. They argued that there was no consideration for the promise and that all the plaintiff had done was to marry his fiancee which he was bound to do before the uncle wrote his letter (at that time a promise to marry was considered legally binding and could be sued upon if broken). The majority of the court held that when the plaintiff married his fiancee that would constitute consideration. It was a detriment to the plaintiff because it involved incurring financial responsibilities which could have been problematic without the uncle's allowance. The court also accepted that the marriage provided some benefit to the plaintiff. The court held that there was also some benefit to the uncle in that he would be pleased about the marriage of such a near and close relative.

[47] Consideration and motive are quite different from one another. With consideration, the promisor gets something in return for the promise. But it is not the same with motive. The difference between motive and consideration can be seen in the case of *Thomas v. Thomas* [1842] 2 QB 851 and the brief facts may be stated as follows. When Mr. Thomas died, the matrimonial home was in his name. He had verbally expressed a desire that his wife be permitted to continue living in the house after his death and his executors, relying on that desire, agreed to her continued possession. Their permission was stated to be in consideration of the husband's expressed wish, but they attempted to protect themselves by requiring that the wife undertake to keep the house in good repair and that she pay a nominal ground rent of £1 per

annum. The executors subsequently refused to sign the necessary deed and the wife sued. She succeeded. Even though the executor's motive to carry out her husband's last wishes could not be consideration, her promise to pay £1 per annum in rent could be and that was enough to make the agreement enforceable. That promise was valuable, it was sufficient to make the agreement binding. Patteson J, at p. 333 of the report aptly said:

> Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff: ... a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator; ... .

[48] Two more examples to show the distinction between motive and consideration must be highlighted. They formed the old cases. *White v. Bluett* [1853] 23 LJ R Ex. 36 is one of them. The other is *Dunton v. Dunton* [1892] 18 VLR 114.

[49] The facts in *White v. Bluett (supra)* are as follows. There the defendant had borrowed money from his father and had secured the debt with a promissory note. When his father died the debt was still outstanding and the executors sued. In his defence the son alleged that, in consideration of his promise to stop complaining that his brothers had received preferential treatment, his father had promised to forgive him about the debt and to discharge him from further liability. The court held that the son had no legal right to complain in the first place. That is, in not complaining, he had suffered no legal detriment. The agreement therefore was wholly attributable to the father's desire not to suffer further annoyance and that would be his motive and so it was unenforceable.

[50] The facts in *Dunton v. Dunton (supra)* are as follows. Mr. Dunton agreed to pay his divorced wife a monthly sum provided that she "conduct herself with sobriety, and in a respectable, orderly and virtuous manner". The divorced wife sued him to recover the promised amount when the husand reneged. She succeeded. The court held that whilst Mr. Dunton's motive in offering the money, his desire that she conduct herself in such a way as not to bring discredit upon their five young children could not be good consideration whereas the divorced wife's promised forbearance was held to be good consideration. The court held that the divorced wife had a perfect legal right to act in a

disorderly manner, to drink and to behave as she pleased within the limitations of public decency. And when she gave up these rights, it constituted a detriment and thus was sufficient consideration to support the promise.

[51] Thus, it can be seen that forbearance (deliberately omitting to do some act or to exercise some right, usually upon the request of another) can constitute good consideration. In *Dunton v. Dunton (supra)*, for instance, the consideration alleged need not be an act or a thing. It may simply be a promise not to do something which the promisee was entitled to do. Such failure to exercise a present existing right, at the request of the promisor, will constitute good and sufficient consideration.

[52] Back home in Malaysia, the question of moral obligation is neatly housed in s. 26(a) of the Contracts Act 1950 (Act 136) (Revised 1974) which reads as follows:

> **26 Agreement without consideration, void, unless:**
>
> An agreement made without consideration is void, unless:
>
> **it is in writing and registered;**
>
> (a) it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other.

[53] In *Macon Works & Trading Sdn. Bhd. v. Phang Hon Chin & Anor.* [1976] 2 MLJ 177 at p. 181, Hashim Yeop Sani J, (as he then was) said that "An agreement without consideration is void unless it comes under one of the exceptions in s. 26 of our Contracts Act 1950". Again, in *J.M. Wotherspoon & Co. Ltd. v. Henry Agency House* [1962] MLJ 86 at p. 87, Suffian J, (as he then was) aptly said that "An agreement made without consideration becomes a contract if, but only if, in the words of s. 26(b) of the Contracts (Malay States) Ordinance No. 14 of 1950: 'It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor'."

[54] With the benefit of hindsight, it seems to me that s. 26(a) of the Contracts Act 1950 (Act 136) (Revised 1974) follow closely the suggestions of Lord Mansfield which require both written and moral obligation to be the prerequisites for consideration.

[55] Section 26(a) of the Contracts Act 1950 (Act 136) (Revised 1974) states that an agreement made without consideration is void. So every agreement must have some form of consideration. And that such an agreement that is made has to be "made on account of natural love and affection between parties standing in a near relation to each other". Furthermore, there is also a requirement that the agreement be "expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents". The phrase "natural love and affection" cannot be read in isolation. It must be linked to the requirement that the parties must be "standing in a near relation to each other". Here, both the parties are biological brothers and they are clearly "standing in a near relation to each other". The facts as alluded to in the early part of this judgment would show that the family arrangements fulfilled all the requirements of s. 26(a) of the Contracts Act 1950 (Act 136) (Revised 1974). For all these reasons, I would agree with my learned brother Low Hop Bing, JCA that the family arrangements have all the trappings of legality and they must be held to be valid and enforceable.

[56] It has always been the case that when interpreting a document like the family arrangements in question, the advice of Lord Hoffmann in *Bank of Credit and Commerce International SA v. Ali and Others* [2002] 1 AC 251 at p. 269 must be heeded and that would be that the "primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage". And according to Lord Bingham of Cornhill in the same case at p. 259, the court "reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties". I have done just that in interpreting the family arrangements.

[57] What is left for me now is to make those orders as made by my learned brother Low Hop Bing, JCA and I do so accordingly.